

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 20, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1504  
STATE OF WISCONSIN**

**Cir. Ct. No. 2009CV547**

**IN COURT OF APPEALS  
DISTRICT IV**

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**EQUITY COOPERATIVE LIVESTOCK SALES ASSOCIATION,**

**PLAINTIFF-RESPONDENT,**

**V.**

**FIRST WORLD MANAGEMENT SERVICES, INC.,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Sauk County:  
PATRICK TAGGART, Judge. *Affirmed.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. First World Management Services, Inc. appeals an order denying its motion to reopen a judgment awarding Equity Cooperative Livestock Sales Association \$77,754.53 for breach of contract plus prejudgment interest, costs and attorney fees, and dismissing First World's counterclaim.

Although First World raises several issues on appeal, we conclude that one issue is dispositive. We affirm the order because First World failed to establish excusable neglect, fraud on the court or any other reason justifying relief from the judgment. *See* WIS. STAT. § 806.07(1)(a), (c) and (h) (2011-12).<sup>1</sup>

## BACKGROUND

¶2 Equity’s complaint alleged that First World failed to pay \$77,754.53 for livestock processed at First World’s slaughterhouse. First World counterclaimed for a setoff, alleging that it was due funds for other livestock. Two years into the litigation, First World’s attorney withdrew from representing First World for ethical and financial reasons. The court granted the motion to withdraw and reset a status conference for August 15, 2011. Written notice of the status conference was provided directly to First World, along with the warning “FAILURE OF THE DEFENDANT TO APPEAR FOR THE STATUS CONFERENCE MAY RESULT IN A DEFAULT JUDGMENT BEING ENTERED.” When First World failed to appear at the status conference, the court entered judgment in Equity’s favor for the amount requested in the complaint plus prejudgment interest, costs and \$500 attorney fees, and dismissed First World’s counterclaim.

¶3 Four days later, the court received a letter from First World’s president, Tahawwur Hussain Rana, requesting that the case remain open. Rana stated that he was in custody on federal charges and his operations manager was not in the country due to immigration issues. The letter indicated that Rana knew

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

First World's attorney had withdrawn from the case. Three affidavits were enclosed with the letter. First World's operation manager, Samraz Akhtar, stated that she went to Canada to renew her visa and was not allowed to return to the United States. As a result, she was unable to check the mail. The affidavit of Nessrin Ismail, First World's office assistant, stated that she was on maternity leave as of mid-July 2011 and was unable to check the mail. The affidavit of Raymond Sanders, an Illinois attorney, stated that he shared an office with First World and he sorted the mail. The affidavit stated that Sanders knew First World's attorney had withdrawn and Sanders did not see any notice of a status hearing or telephone conference concerning this lawsuit.

¶4 Sanders also directly wrote the court requesting that he be allowed to temporarily represent First World. The court responded by noting that First World "has done nothing but attempt to delay the proceedings in the past not cooperating with their attorney among other things." The court further advised First World that it was necessary for Wisconsin counsel to file a motion to reopen the case if they believed they had a statutory reason for doing so.

¶5 First World obtained Wisconsin counsel, Roger Merry, who filed a motion for reconsideration based on the same three affidavits originally sent with Rana's letter. The brief in support of the motion acknowledged that First World belatedly discovered the notice of the August 15, 2011 hearing. The court denied the motion and Attorney Merry filed a notice of appeal. Merry then withdrew from this case and First World's present counsel voluntarily dismissed the appeal.

¶6 First World filed the present motion to reopen the judgment. The motion to reopen stated grounds under three subsections of WIS. STAT. § 806.07(1): (a) mistake, inadvertence, surprise or excusable neglect; (c) fraud,

misrepresentation, or other misconduct by an adverse party; and (h) the catch-all provision, any other reasons justifying relief from the operation of the judgment. The motion alleged that First World's failure to appear at the August 15, 2011 hearing arose from the fact that it received neither notice that its attorney had been allowed to withdraw nor that a telephonic conference had been scheduled. Therefore, its failure to appear constituted mistake, inadvertence, surprise or excusable neglect. The allegation of fraud on the court was based on the amount of the judgment. First World contended the amount it owed Equity should have been based on the weight of the livestock received by Equity which would be a lesser amount than the weight of the livestock as shipped. The motion also requested relief under the catch-all provision based on First World's assertions that the judgment was not the result of a conscientious, deliberate, and well-informed choice to default and First World was not represented by an attorney at the time of the default. The motion noted that there had been no judicial consideration of the merits and claimed it had a meritorious defense which related to its counterclaim. The court denied the motion to reopen the judgment. The court's memorandum decision indicated that it denied the motion based on its original findings, the parties' briefs, affidavits, and arguments of counsel.

### DISCUSSION

¶7 The decision whether to reopen a judgment under WIS. STAT. § 806.07 lies within the circuit court's discretion. *Gaertner v. 880 Corp.*, 131 Wis. 2d 492, 500, 389 N.W.2d 59 (Ct. App. 1986). First World argues that the circuit court failed to exercise its discretion by doing nothing more than incorporating its decision on the prior motion for reconsideration rather than addressing the different legal standards that apply to a motion under § 806.07. However, if the circuit court fails to record sufficient reasons to support its

decision, this court may nevertheless examine the record to determine whether the facts support the circuit court's decision. *Id.* at 498. We conclude that the reasons given for denying the motion for reconsideration also establish a sufficient basis for the circuit court's denial of the motion to reopen.

¶8 Regarding First World's claim of excusable neglect, none of the affiants swore that they lacked notice of First World's attorney's motion to withdraw, which had been filed June 21, 2011, seven weeks before the default. Due to Rana's arrest on federal charges, his operations manager's inability to re-enter this country, and his office assistant's maternity leave, Rana should have made arrangements to have somebody check the mail for notices regarding this litigation. "Excusable neglect is not synonymous with neglect, carelessness, or inattentiveness." *J.L. Phillips & Assoc., Inc. v. E & H Plastic Corp.*, 217 Wis. 2d 348, 362 n.5, 577 N.W.2d 13 (1998) (quoted source omitted). Rather, it is that neglect which might have been the act of a reasonably prudent person under the same circumstances. *Id.* Putting off finding a replacement attorney and not hiring someone to check the mail are not the acts of a reasonably prudent person. None of the affidavits submitted by First World averred that the notice of the hearing had not been received, and its brief in support of the motion for reconsideration admitted that the notice was discovered "belatedly." The affidavits also failed to state lack of knowledge that First World's attorney had notified it that he was withdrawing from the case. Because First World failed to allege facts that would show reasonable prudence, the circuit court properly found that it failed to establish excusable neglect.

¶9 Regarding First World's allegation of fraud or misrepresentation, the claim appears to relate only to the amount of the judgment based on the weight of the livestock. First World's answer and counterclaim did not allege fraud or

misrepresentation. WISCONSIN STAT. § 806.07(1)(c) cannot be invoked by merely characterizing an ordinary defense as fraud or misrepresentation after the court enters judgment for the amount requested in the complaint.

¶10 Regarding First World’s claim under WIS. STAT. § 806.07(1)(h), the “catch-all” provision, that subsection should be used only in an extraordinary case. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶35, 273 Wis. 2d 76, 681 N.W.2d 190. That subsection “should be used only when the circumstances are such that the sanctity of the final judgment is outweighed ‘by the incessant command of the court’s conscience that justice be done in light of all of the facts.’” *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 550, 363 N.W.2d 419 (1985) (quoted source and emphasis omitted). Several of the factors identified in *M.L.B.* support the circuit court’s refusal to reopen the judgment. First World’s failure to hire replacement counsel or to have somebody open its mail to look for court notices can be viewed as a deliberate choice to forego any defense in this action. While First World was not represented at the time of the default, it was represented by counsel until the day the court rescheduled the hearing. This is not comparable to *M.L.B.* where a party was not represented by any attorney throughout the proceeding. This is also not a case where the default resulted from a failure to file an answer. Rather, the default occurred two years into the litigation after First World attempted to delay the proceedings and did not cooperate with its counsel. Under these circumstances, reopening the judgment was not required to correct an injustice.

¶11 The remaining issues raised on appeal, the amount of the judgment, Equity’s entitlement to prejudgment interest, and the award of \$500 attorney fees are not properly the subject of this appeal. Those issues should have been raised in the appeal from the underlying judgment that was voluntarily dismissed. The

underlying judgment and the order denying relief under WIS. STAT. § 806.07 are separate final decisions. *Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.*, 185 Wis. 2d 791, 811 n.10, 519 N.W.2d 674 (Ct. App. 1994). Issues that relate to the judgment are not cognizable in an appeal from an order denying relief under WIS. STAT. § 806.07.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

